Supreme Court, U.S.
FILED
JAN 16 2003

No. 02-934

In The

Supreme Court of the United States

ELIZABETH WILSON,

Petitioner,

v.

MANPOWER INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA AND THE ELEVENTH CIRCUIT COURT OF APPEALS

On January 4, 2000, Petitioner filed suit against Respondent and Douglas Krueger in the United States District Court for the Northern District of Georgia. R1-1.[1] She thereafter amended the Complaint, dismissing the individual defendant and retaining only the ADEA claim against Respondent. R1-18. After the close of discovery, Respondent filed a timely motion for summary judgment. R1-24. Petitioner filed a brief in opposition (R2-31), to which Respondent filed a timely reply. R3-35. On September 26, 2001, the District Court granted the motion. On October 11, 2001, Petitioner appealed to the Eleventh Circuit Court of Appeals. Following oral argument on September 10, 2002,[2] the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court, *per curiam*, on September 19, 2002.

B. STATEMENT OF THE FACTS

Respondent is an employee staffing company that provides other employers with employees for temporary work assignments. 1SR-Wilson Dep. at 19. Respondent's

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[1] Unless otherwise noted, all citations are to the record before the Eleventh Circuit Court of Appeals.

[2] During oral argument before the Eleventh Circuit panel, the Chief Judge asked counsel for the Respondent if Respondent had sought an award of attorneys' fees in the District Court. Counsel for Respondent answered in the negative, but only because the law does not permit an award of attorneys' fees in an ADEA case. 29 U.S.C. § 216(b). The panel's question does, however, reflect just how weak Petitioner's case is.

philosophy is to "treat people with respect 100 percent of the time, period." 1SR-Grizzle Dep. at 120.

1. Respondent Hires and Promotes Petitioner

On December 1, 1993, Petitioner began working for Respondent as the branch manager of its Salisbury, North Carolina branch. 1SR-Wilson Dep. at 19, 22. At the time of her hiring, Petitioner was 53 years old.[3] *Id.* at 5. Petitioner was hired by Lynda Bowman, the Charlotte, North Carolina area manager. *Id.* at 15-16. Bowman was born on April 8, 1940, and is 61 years old. 1SR-Bowman Dep. at 5, 74. By December 26, 1994, Petitioner had been promoted to be a district manager in North Carolina. 1SR-Wilson Dep. at 22. Subsequently, Respondent's Southeast Regional Vice President, Carl Grizzle, recommended Petitioner for the vacant position of Area Manager in Atlanta, Georgia. 1SR-Grizzle Dep. at 53-54. After interviewing with Terry Hueneke, Respondent's Executive Vice President, and Douglas Krueger, Respondent's Vice President for U.S. Operations, Petitioner received the promotion effective April 3, 1995. 1SR-Wilson Dep. at 23, 36-37. She was 55 years old. *Id.*

2. Respondent Receives Numerous Complaints About Petitioner

After Petitioner became the area manager in Atlanta, Respondent began receiving complaints about Petitioner from its employees. The employees complained that employee turnover in Petitioner's area was very high, that morale was terrible, and that Petitioner (1) verbally abused them, (2) was the reason they were resigning, (3) employed poor management tactics and had poor people skills, (4) was not objective, (5) threw temper tantrums

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[3] Petitioner's birthdate is November 18, 1939.

during meetings, (6) was crazy, negative and degrading to the staff, (7) did not keep conversations confidential, and (8) was unprofessional, micromanaging, and intimidating. R3-37-3.

a. Diana Haas

For example, on October 23, 1995, Diana Haas, an eight-year veteran of Respondent, resigned. 1SR-Wilson Dep. Ex. 17. Hass' resignation letter to Petitioner states, "I will not be subjected to the humiliation of having you [Petitioner] tell my downtown staff, in my presence, why I am leaving them." *Id.*

b. Pamela Barkley

During her exit interview in January 1996, Barkley complained about Petitioner's treatment of her. 1SR-Wilson Dep. Ex. 15. Barkley's signed interview summary states:

> [Petitioner] shut the door and berated [Barkley] and the Branch Manager in a vociferous manner, loud enough to be heard by the Service Representatives in the outer office . . . . This was not the only less than professional treatment I received. On more than one occasion [Petitioner] told me during conversations (or perhaps they were lectures) to 'hush.' It has always been my understanding that every [employee of Respondent] be treated with respect; however, I do not feel respect has been shown to me or to others in the Atlanta complex.

Id.

c. Vallerie Brown

On August 9, 1996, in connection with her decision to resign from Respondent, Brown wrote a letter to the President of Respondent in which she stated:

> I resigned on Aug. 2, 1996. There was only one reason for my doing this, [Petitioner]. The Atlanta Complex has had continuous turnover and if asked, the staff would say the cause was [Petitioner]. The Atlanta Complex will continue to experience these high levels of turnover unless [Petitioner] is trained in people skills, relocated, or permanently removed.

1SR-Wilson Dep. Ex. 19.

Brown's letter also describes an incident in which an employee accidentally opened a letter addressed to Petitioner. *Id.* When Brown informed Petitioner who opened the letter, Petitioner screamed at Brown and threatened that if either the employee or Brown did so again, they would be fired. *Id.* In notifying Grizzle about Brown's letter, Krueger wrote, "this is an official complaint, we need to officially respond." *Id.* Krueger took the complaint "very seriously because he put the word official out there." 1SR-Grizzle Dep. at 129.

d. Else Henry

In her resignation letter dated November 9, 1996, Henry describes several unpleasant confrontations with [Petitioner]. 1SR-Wilson Dep. Ex. 18. The letter begins, "This letter is to serve as a formal complaint against [Respondent]." *Id.* In the letter, Henry complains that Petitioner "lashed out" at her and characterizes Petitioner's behavior as "inexcusable" and "completely unprofessional and inappropriate." *Id.* Henry sent the letter to a number of Respondent's managers and to the Better Business Bureau. *Id.*

e. Susan D'Arezzo

In her resignation letter dated February 18, 1997, D'Arezzo states that:

> There are major problems in the Atlanta complex. *There are new employees who are on the*

> *verge of leaving their positions, and morale is low*. The method of micromanaging being applied has become more of a burden than a benefit and causes a loss in productivity along with accountability. . . . I feel I *have become another of [Petitioner's] targets*, and it makes no sense for me to deal with that on top of the many other duties and responsibilities required by my position. *The situation is causing me to become ill*, and my health is too important to allow this to happen.

1SR-Wilson Dep. Ex. 20 (emphasis added).

f. Elizabeth Evers

Elizabeth Evers, another employee who worked under Petitioner, also complained about and to Petitioner in writing. 1SR-Wilson Dep. Ex. 22. Evers' memorandum states:

> As much as I appreciate your [Petitioner's] constructive criticism, I resent being called a liar . . . never lied to you about anything. After that comment in our conversation I felt unjustly slammed. I consider being called a liar as a personal assault on my character.

Id.

On June 10, 1997, Petitioner sent Grizzle a memorandum about another incident she had with Evers:

> [T]oday in the mist [sic] of a confrontation . . . my temper got the best of me and some of my comments may not have been appropriate – [sic] I was/am angry at myself as I should have recognized the 'set-up.' I may owe you and [Respondent] an apology over this incident.

Id.

Petitioner never apologized to Evers. 1SR-Wilson Dep. at 70.

g. Mary Heekin

Another employee, Mary Heekin, sent a strongly worded letter in connection with her decision to resign from Respondent. 1SR-Wilson Dep. Ex. 25. Heekin's letter states in part:

> I want to let you know first hand of the unacceptably low level of morale amongst the employees due mainly to the exceptionally poor management tactics of [Petitioner]. I say in all sincerity that I have never been employed by an organization where an individual in any type of leadership role has had such a dramatically negative effect on the employees as a whole.

Id. (emphasis added).

h. Anonymous Complaints

Respondent also received anonymous complaints from employees about Petitioner. On June 3, 1997, Respondent received a letter via facsimile that states:

> Dear Mr. Krueger:
>
> I am a Service Representative in the Atlanta Complex. I cannot identify myself because I am in fear of loosing [sic] my job if I do. I have seen it happen to others. The Atlanta Complex is in trouble. *Surely you have had complaints and are aware of our problems.* Why hasn't something been done? *[Petitioner] is a cruel person and is constantly on someone.* I understand that we have business to conduct, however, abusing people verbally is not the way to enhance attitude to work as a team and get more business. Please help us. If my manager walks, we will too. *We are afraid of her [Petitioner]. She yells, flies off at people for no reason and has even thrown things.* Attitude is everything and we are at our wits [sic] end as to what to do.

Sincerely,

Someone who wants to stay with [Respondent].

1SR-Wilson Dep. Ex. 23 (emphasis added).

Another anonymous employee sent an "urgent fax" on June 16, 1997 that states:

> Help!
>
> *Atlanta is burning and [Petitioner] is both the match that lit the fire and the fan that keeps it burning. We need help from the home office! Carl Grizzle must be protecting her* because I can not imagine anyone allowing an area manager to repeatedly be *the primary reason good people keep leaving in Atlanta* and not investigate the problem. Morale is horrible here. *You are about to lose several more good people in Atlanta because of frustration directly caused by [Petitioner].* Most will not come forward because they have no confidence that anything will be done and so it would probably only make things worse. *When they do leave they don't tell the real reason in the exit interview because they are usually with her* and by then their decision to leave is made and it doesn't matter anymore. . . .
>
> FROM SOMEONE WHO CARES IN ATLANTA

1SR-Wilson Dep. Ex. 24 (emphasis added).

i. William Tasillo

According to Petitioner, another management employee who resigned, William Tasillo, also sent a letter to the President of Respondent expressing dissatisfaction with Petitioner. 1SR-Wilson Dep. at 160-161. Apparently the letter was not retained; otherwise, it would have been included among the many other complaints that Respondent received about Petitioner.

3. Petitioner Attempts To Address The Problem

Based on the number and severity of the complaints Respondent was receiving about Petitioner, Grizzle (Petitioner's immediate superior) finally took action. In a memorandum to Krueger dated March 17, 1997, Grizzle said: "I will be in Atlanta most of all next week. I plan to spend considerable time with [Petitioner] going over my concerns about her management style." 1SR-Wilson Dep. Ex. 20. Grizzle also wrote Petitioner a memo dated March 28, 1997. 1SR-Wilson Dep. Ex. 21. In the memo, Grizzle discusses Wilson's "micro-managing/[o]ver-managing" of her staff, and her need to develop greater listening skills. *Id.* Grizzle's memo further states:

> Elizabeth, you're a smart person, but on a number of occasions *I have heard you make some comments, that had you thought a bit more about, you probably would not have made. This will get you in trouble* with some people if they read your comments the wrong way. *Several individuals have brought this to my attention over the past year or so.* If you isolate managers, service staff, or customers, *oftentimes there is no recovery.*

Id. (emphasis added). Grizzle also spoke to Petitioner in person and told her that she needed to be more careful about how she spoke to her subordinates.[4] 1SR-Grizzle Dep. at 150.

Not only did Grizzle receive more complaints about Petitioner than any other area manager (*Id.* at 164), he also personally witnessed her get "out of control" once or twice. *Id.* at 179. On two occasions, managers told Grizzle that Petitioner spoke "harshly" to people. *Id.* at 190. Grizzle characterizes Petitioner's "management style . . .

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[4] This evidence from the record belies Petitioner's assertion that Grizzle "conducted a full investigation of those 'complaints' and found them to be meritless." Pet. For Writ Of Cert. ("Petition" or "Pet.") at 4.

as something less than friendly, . . . maybe she was too aggressive" which is why "she kind of [sic] rubbed off on [sic] people the wrong way." *Id.* at 110-111. D'Arezzo, a 12-year veteran of Respondent, resigned "because of some differences with [Petitioner]," even though Grizzle asked D'Arezzo to stay. *Id.* at 140. In addition to counseling Petitioner orally and in writing as described above, Grizzle also arranged for Petitioner to attend a seminar, at Respondent's expense, on "How to Supervise People." *Id.* at 150; 1SR-Wilson Dep. Ex. 21.

Petitioner was fully aware of the complaints about her. On October 6, 1997, she sent a memorandum to Grizzle stating, "It seems that the people who are heard are the ones who resign, write letters or make phone calls." 1SR-Wilson Dep. Ex. 27. Petitioner's memorandum also refers to a "conspiracy" against her by ex-employees of Respondent. *Id.*

4. Respondent Discharges Grizzle For Sexual Harassment

In late 1997, Grizzle, Petitioner's direct supervisor, was suspended, and in early 1998, Respondent discharged him due to allegations of serious sexual harassment. 1SR-Grizzle Dep. at 94, 98, 177. Krueger, the Vice President of U.S. Operations in Milwaukee, began serving as acting regional vice president for the Southeast, in addition to his regular duties, until a replacement for Grizzle could be found. 1SR-Wilson Dep. at 95.

5. Complaints About Petitioner Continue

The complaints about Petitioner continued after Grizzle's discharge.

a. Geri Priestman

Geri Priestman, age 56, was a district manager in Atlanta working under Petitioner. 1SR-Priestman Dep. at

13, 146. In May 1998, Priestman telephoned Krueger to complain about Petitioner. *Id.* at 69, 80. Priestman confided to Krueger that she might resign because of the way Petitioner was treating her. *Id.* at 148.

Approximately one month later, in June 1998, Priestman again contacted Krueger to notify him that Petitioner had referred to Krueger in Priestman's presence as an "S.O.B. coward." *Id.* at 97. Priestman further reported to Krueger that Petitioner had said that she [Petitioner] knew someone was feeding information to Krueger, and if Petitioner found out who it was, she [Petitioner] would get even. 1SR-Priestman Dep. at 103. Priestman put this information in writing. 1SR-Priestman Dep. Ex. 65.

Priestman continued to communicate with Krueger about Petitioner's conduct. 1SR-Priestman Dep. at 79-80. At various times, she notified Krueger that she and others were afraid of Petitioner, that Petitioner intimidated people, that morale was terrible, that Petitioner was very negative, that employees in Atlanta were very disheartened, that Petitioner did not visit branch offices, that Petitioner's attitude was "I am the boss," that Petitioner degraded the office staff, and that Petitioner had once said, "I want to go back to North Carolina so they can run it themselves." *Id.* at 127; 1SR-Krueger Dep. Ex. 55.

Even though she had not been treated previously for stress, Priestman sought medical treatment because she could not sleep. 1SR-Priestman Dep. at 118. Priestman was prescribed and began taking Paxil, an antidepressant, in order to help her cope with the situation at work.[5] *Id.* at 123, 149.

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[5] This testimony, with numerous citations to the record, seems at odds with Petitioner's assertions in her Petition that Priestman's deposition testimony was "[c]ontrary to Respondent's claims of 'employee abuse'. . . . " Pet. at 5. In any event, there is no dispute that employee abuse is what Priestman reported to Krueger.

b. Harold Schwartz

In June 1998, Respondent was in the process of recruiting Harold Schwartz, a candidate from outside the Company, for a technical manager opening in Atlanta. 1SR-Wilson Dep. Ex. 37. After interviewing with Petitioner, Schwartz withdrew his name from consideration. *Id.* Krueger contacted Schwartz to find out why, and Schwartz told Krueger that the interview with Petitioner "did not go well and he was turned off by it." *Id.* Schwartz also said that he had contacted some former employees of Respondent and that those conversations made him decide that there was "too much opportunity in Atlanta to put up with the management style that was described to him." *Id.*

c. Kathi Badal

In late 1998, Badal resigned from Respondent in Atlanta. 1SR-Wilson Dep. Ex. 48. Krueger telephoned Badal to find out why. *Id.* Badal cited a number of reasons, including lack of guidance, lack of direction, high turnover, low morale caused by feeling "threatened and insecure," and the need for Petitioner to be far more visible – "not for instructions, but just support." *Id.*

d. LuAnn Budd

Another one of Respondent's managers in Atlanta, LuAnn Budd, also complained about Petitioner. Budd telephoned Krueger and told him that working in Atlanta "has been absolutely hell" since Petitioner arrived, that Petitioner "talks negative about Pam Krueger, Jim Haughsland and Doug Krueger at every turn," that Petitioner is "absolutely crazy," that Petitioner is intimidating and scary, that Petitioner "yells about reports" during meetings, has temper tantrums, and intimidates and threatens employees. R1-24 App. Budd Aff. ¶ 6. On one occasion, Petitioner yelled so loudly at Budd that

Priestman intervened when she heard Budd crying. 1SR-Priestman Dep. at 88. Budd still has nightmares about Petitioner. *Id.* R1-24 App. Budd. Aff. ¶ 11.

e. Another Anonymous Complaint Letter

On July 20, 1998, Krueger received another anonymous complaint letter about Petitioner.[6] 1SR-Wilson Dep. Ex. 41. The letter states that Petitioner and Priestman are ruining Respondent's Atlanta market. *Id.* The author of the letter says that going to work is like "going to battle" with "Dr. Jeckle [sic] and Mrs. Hyde." *Id.* The letter further describes Wilson as not objective, not visible to employees, not trustworthy, and the source of numerous resignations. *Id.* The letter further predicts that Respondent will lose customers if "we have turnover in the magnitude that we have in the last year" because "customers get very frustrated when they call an office and everyone they are familiar with is no loner [sic] with the organization." *Id.*

6. Krueger's Attempts To Counsel Petitioner

Petitioner considered her relationship with Krueger, whom she had called an "S.O.B. coward"[7], to be strained and unpleasant. 1SR-Wilson Dep. at 136. After Krueger visited Atlanta in May 1998, Petitioner sent him a memorandum in which she stated, "My comments during the drive to the airport were out of line and I apologize." 1SR-Wilson Dep. Ex. 35. Following another Krueger visit in June 1998, Petitioner wrote to Krueger, "I am sorry I

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[6] Petitioner was aware of the letter, which she believes was sent by an employee of Respondent by the name of Regina Davis. 1SR-Wilson Dep. at 109-110.

[7] While Petitioner denies using this term in reference to Krueger (1SR-Wilson Dep. at 94), she has no basis for denying that this is what Priestman reported to Krueger.

offended you with my statement about lack of support." 1SR-Wilson Dep. Ex. 38. As early as November 1997, Petitioner had concluded that Krueger did not want her in Atlanta. 1SR-Wilson Dep. at 128.

On June 4, 1998, Krueger wrote the following to Petitioner:

> I continue to hear inferences [sic] from Atlanta staff of discontentment [sic] and what they perceive as a lack of positive leadership and reinforcement from you. We've had long discussions in the past concerning your need to be viewed as supportive and the leader of the team. It has improved, but the perception generally is still there.

1SR-Wilson Dep. Ex. 36. Krueger's memo to Petitioner further states that he is aware that Petitioner wants to leave her position in Atlanta and observes that a job change would be in both Petitioner's and Respondent's best interests. *Id.* The memo explains that Krueger is working towards that goal, that he hopes Petitioner will be "patient with that process," and that he hopes "to be able to offer [her] something to [her] liking." *Id.*

On October 14, 1998, Krueger sent Petitioner a memo addressing the issue of high employee turnover in the Atlanta market. 1SR-Wilson Dep. Ex. 49. Krueger calculated that if turnover continued at the same rate through the end of 1998, total annual turnover would be 94%. *Id.* Petitioner sent a reply memorandum, questioning Krueger's figures, and stating that employee turnover would be 66.7% by year-end. 1SR-Wilson Dep. Ex. 50. Petitioner nevertheless admitted that "turnover was too high." *Id.* Replying to Petitioner's figures, Krueger pointed out that even using her figures, the annualized employee turnover rate would be 77%. *Id.* In one meeting with Petitioner, Krueger shared with her the fact that average turnover at Respondent was approximately 40-50%, and observed that the high turnover had begun in 1995, when

Petitioner first arrived in Atlanta. 1SR-Wilson Dep. at 114-116. Krueger told Petitioner that he, Fromstein (Respondent's President), and Hueneke (Executive Vice President) had higher expectations for the Atlanta market. *Id.* at 116.

Also in October 1998, Krueger gave Petitioner a copy of the "Customer Satisfaction" report for the business areas in the Southeast region, including Atlanta. *Id.* at 142. The report measures the level of customer satisfaction (or dissatisfaction) within Respondent's service areas. Of the seven business areas in the Southeast, Atlanta was rated *last* in *all ten categories* and was "significantly lower than the mean of all other regions." 1SR-Wilson Dep. Ex. 53. Petitioner says she was disappointed with the results. 1SR-Wilson Dep. at 144.

Eventually Krueger and Petitioner "had a pretty serious talk about the market" during which Krueger warned Petitioner that, under the circumstances, unless things changed, Petitioner "will not be here." *Id.* at 117. Despite all this, Petitioner did nothing to change her management style. *Id.* at 157.

7. Respondent Investigates The Situation In Atlanta

Around September 1998, Petitioner contacted David Wescoe, Respondent's Vice President of North American Administration in Milwaukee, because of her difficulties with Krueger. *Id.* at 126.

Also in late 1998, Krueger recommended to Terry Hueneke, Respondent's Executive Vice President, that Respondent conduct an investigation into the situation in Atlanta due to "the severe problems we were having with the staff in Atlanta." 1SR-Krueger Dep. at 48-49; 1SR-Hueneke Dep. at 74-75.

Respondent sent two employees from Milwaukee to investigate, Christine L. McLaughlin, an attorney in the Human Resources Department, and Kathleen Marcott, another employee in Human Resources. 1SR-Wescoe Dep.

at 30. Budd and Priestman both met with the investigators from Milwaukee and reiterated their previous grievances about Petitioner's conduct in greater detail. R1-24 App. Budd Aff. ¶ 7; 1SR-Priestman Dep. at 110-111. McLaughlin and Marcott met also with Petitioner, a meeting which Petitioner says lasted for approximately five hours. 1SR-Wilson Dep. Ex. 56. Wilson later expressed concern that some of her investigators' "questions related to statements dating back prior to 1997." *Id.*

After the investigation was concluded, Hueneke decided that Respondent should offer Petitioner two options: (1) return to North Carolina as a district manager under the supervision of her previous mentor, Lynda Bowman, or (2) leave Respondent's employ with a separation package consisting of six months pay, be given her company car, and relocate back to North Carolina at Respondent's expense. 1SR-Hueneke Dep. at 86, 1SR-Wilson Dep. at 170-171. Petitioner's "ultimate goal" had been to return to North Carolina, where she still owned a home. 1SR-Wilson Dep. at 83. Respondent contacted Bowman before offering the position to Petitioner to make sure that Bowman would be willing to have Petitioner back in her area. 1SR-Bowman Dep. at 68. Bowman agreed, and telephoned Petitioner to encourage her to accept the assignment. 1SR-Wilson Dep. at 174. It was Petitioner's understanding that under company policy she would experience no reduction in salary. *Id.* at 171.

On January 8, 1999, Respondent presented the two options to Petitioner. *Id.* at 170-171; Wilson Dep. Ex. 60. Petitioner chose to leave Respondent, accepting the second option of six months' severance, the company car, and relocation back to North Carolina. *Id.* at 170-173; Exs. 60, 61. The only reason Petitioner rejected the transfer back to North Carolina is because it was a demotion. *Id.* at 173. Shortly thereafter, Petitioner returned to her house in North Carolina. Although Petitioner performed no work for Respondent after January 8, 1999, Respondent continued to pay her through March 1999. *Id.* at 178-180.

When a dispute arose as to whether the separation package offered to Petitioner also contemplated Petitioner executing a release of claims (Petitioner said she should not have to sign a release, Respondent said she did), Respondent increased the monetary offer from six months to seven months pay (plus the car and relocation reimbursement) in exchange for a release. Petitioner accepted the increased offer. 1SR-Wilson Dep. Ex. 61.

Petitioner testified that she signed a release-of-claims document on March 18 or 19, 1999. 1SR-Wilson Dep. at 176-178; Ex. 61. On March 29, 1999, she then, through her attorney, revoked her acceptance. *Id.* at 178. By the time she had revoked her acceptance in late March 1999, Petitioner realized that returning to Respondent was not an option. *Id.* Having chosen to accept a severance package rather than remain with Respondent, and then revoking her acceptance, Petitioner rendered herself unemployed. 1SR-Hueneke Dep. at 106.

8. Respondent Replaces Grizzle And Petitioner

In April 1999, Respondent filled the position of regional vice president for the Southeast with Donald G. Johnston, a current employee of Respondent who relocated to Atlanta from the Pittsburgh area. R1-24 App. Johnston Aff. ¶ 3. As of October 9, 2000, Johnston was 53 years old.

Johnston did not try to fill the job of area manager until May 2000, and it was on September 25, 2000 that Kathy Taylor, an external hire with 20 years of experience in the staffing industry, filled the position. R1-24 App. Johnston Aff. ¶ 5. Taylor was 55 years old when Respondent hired her. *Id.* ¶ 6.

REASONS FOR NOT GRANTING THE WRIT

SUMMARY OF REASONS FOR NOT GRANTING THE WRIT

In her concurring opinion in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 154-155 (2000), Justice Ginsburg suggests that it may become incumbent upon the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond that which would be required to rebut evidence of non-discriminatory treatment by an employer. Petitioner's suggestion, however, that this case is an appropriate vehicle for such an undertaking is inapposite.

Petitioner offered no evidence to suggest that Respondent's legitimate non-discriminatory reasons for offering her the option of returning to North Carolina to be a district manager or accepting a severance package were pretextual. Moreover, Respondent replaced Petitioner in Atlanta with someone (Ms. Taylor) age 55, which, without more, precludes a prima facie case of age discrimination because Ms. Taylor is not significantly younger than Petitioner. *See, O'Connor v. Consol. Coin Caterers*, 517 U.S. 308, 313 (1996).

Respondent removed Petitioner from her position in Atlanta because of the way she treated her subordinates and the high turnover and numerous employee complaints that resulted from that treatment. That Respondent received continuous documented complaints about Petitioner's mistreatment of employees is undisputed. That most of those complaints came from employees who resigned, or threatened to resign, from Respondent's employ is undisputed. That many of the people who did resign were managers with considerable experience is undisputed.[8] That turnover in

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[8] D'Arezzo had been with Respondent for twelve years and Hass for eight years.

Petitioner's area was too high is undisputed. That Petitioner was replaced in Atlanta by someone 55 years old and with 20 years of experience is undisputed. That abusing employees and high turnover are legitimate, non-discriminatory reasons is undisputed. Petitioner offered no probative evidence to the contrary.

Petitioner's failure to meet the minimum requirement to survive judgment as a matter of law, i.e., offer evidence from which a rational factfinder could conclude that Respondent's reasons were pretextual, belies her suggestion that this case is an appropriate opportunity for the Court to define the circumstances in which plaintiffs would be required to submit evidence *beyond* this minimum threshold in order to survive a motion for judgment as a matter of law.

The District Court properly granted summary judgment. The Eleventh Circuit Court of Appeals properly affirmed that judgment, *per curiam*. Respondent respectfully requests that the Court deny this Petition for certiorari.

ARGUMENT

I. PETITIONER'S FAILURE TO OFFER EVIDENCE REBUTTING RESPONDENT'S LEGITIMATE, NON-DISCRIMINATORY REASONS MAKES THIS CASE AN INAPPROPRIATE VEHICLE TO DEFINE THE CIRCUMSTANCES IN WHICH PLAINTIFFS WILL BE REQUIRED TO SUBMIT EVIDENCE BEYOND THAT FROM WHICH A FACTFINDER COULD CONCLUDE THAT AN EMPLOYER'S PROFFERED REASONS ARE FALSE

In her concurring opinion in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 154-155 (2000), Justice Ginsburg suggested that "it may become incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be

required to submit evidence beyond" that which would be required to rebut evidence of non-discriminatory treatment by an employer in order to survive a motion for judgment as a matter of law. Petitioner's failure to offer evidence from which a rational factfinder could conclude that Respondent's reasons are pretextual, as the Court in *Reeves* held is necessary to survive judgment as a matter of law, belies Petitioner's suggestion that this case is appropriate for such an undertaking.

In *Reeves*, the Court held that an employment discrimination plaintiff *may* survive summary judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. *Reeves*, 530 U.S. at 149. As shown below, Petitioner failed to submit evidence from which a rational factfinder could conclude that Respondent's proffered explanation for its actions – that Petitioner was abusive to employees and that the employee turnover in her area was unacceptably high – are pretextual. Moreover, Petitioner failed to adduce any evidence whatsoever to suggest that it was her age, and not her abusive and unprofessional management style, that motivated Respondent to offer her a demotion or a severance package. As a result, Petitioner failed to meet the minimum standards for surviving a motion for judgment as a matter of law. Certiorari in these circumstances is not warranted.

II. PETITIONER PROVIDED NO CREDIBLE EVIDENCE TO UNDERMINE THE TRUTHFULNESS OF RESPONDENT'S LEGITIMATE NON-DISCRIMINATORY REASONS IN LIGHT OF THE CONTINUED, DOCUMENTED COMPLAINTS ABOUT PETITIONER'S ABUSIVENESS AND THE RESULTING HIGH EMPLOYEE TURNOVER

There is no evidence that Respondent's legitimate non-discriminatory reasons for its actions are pretextual. Where an employer articulates legitimate non-discriminatory reasons, the burden returns to the plaintiff to adduce "significantly probative evidence" that the employer's articulated reasons for its decision are pretextual. *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991); *Carter v. City of Miami*, 870 F.2d 578, 584 (11th Cir. 1989). A plaintiff may not establish pretext merely by contesting the wisdom of the employer's decision, at least where the reason is one that might motivate a reasonable employer. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997). Neither does pretext exist where a plaintiff's only hope is that a jury will simply choose to disbelieve the decisionmaker. *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994).

Respondent has articulated legitimate non-discriminatory reasons for its decision to relieve Petitioner of her duties as Atlanta area manager: chronic employee relations problems as reflected by continuous, documented employee complaints, low morale, and resulting high turnover. 1SR-Krueger Dep. at 49, 50, 54, 55, 157, 177, 195-96, 211-213; 1SR-Hueneke Dep. at 76-78, 80. Petitioner failed to create a disputed issue of material fact as to pretext merely by denying the truth of the repeated complaints lodged against her over a three-year period. Petitioner also offered no comparative evidence, such as evidence showing that there were other, younger managers about whom so many complaints were received, but

who were treated more favorably than Petitioner. R3-37-13.

A. RESPONDENT RECEIVED CONTINUOUS, DOCUMENTED COMPLAINTS FROM EMPLOYEES, MANY OF WHOM RESIGNED, REGARDING PETITIONER'S UNPROFESSIONAL TREATMENT OF THEM AND THERE IS NO EVIDENCE TO SHOW THAT REASON IS A LIE

The evidence is uncontroverted that Respondent received many complaints regarding Petitioner's behavior toward her subordinates in Atlanta. *See, e.g.*, 1SR-Wilson Dep. Exs. 15, 17, 18, 19, 20, 22, 23, 24, and 25. Unable to deny that the complaints were made, Petitioner misstates the facts in the record and argues that Respondent somehow believed that all of the documented complaints about Petitioner were false.[9] Pet. at 2.

1. Respondent Believed That The Continuous Stream Of Employee Complaints Reflected A Serious Employee Relations Problem In The Atlanta Area

In arguing that Respondent disbelieved all of the employee complaints it received about Petitioner, Petitioner relied on the testimony of the former Regional Vice President, Grizzle, whom Respondent had fired for sexual harassment *thirteen months before* it decided that Petitioner could not continue as Atlanta area manager. Pet'r

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[9] Unless Respondent knew the complaints were false, whether or not the complaints were actually false is irrelevant. As long as Respondent honestly believed the complaints, they serve as a legitimate, nondiscriminatory reason for Respondent's decision. *Elrod v. Sears, Roebuck & Co.*, 929 F.2d 1466, 1470 (11th Cir. 1991).

Br. to the United States Ct. of Appeals for the Eleventh Circuit ("Pet'r 11th Cir. Br.") at 13-14. The long-fired Grizzle had no role in the decision to remove Petitioner as area manager, and therefore what Grizzle did or did not believe is immaterial. *Trotter v. Bd. of Trs. of the Univ. of Ala.*, 91 F.3d 1449, 1457 (11th Cir. 1996).

Equally important, there is no evidence that Krueger or Hueneke disbelieved the complaints of employee abuse. Krueger, who recommended an investigation, did not always accept what Grizzle told him. 1SR-Krueger Dep. at 157; R3-37-14. It is undisputed that the Executive Vice President in Milwaukee, Terry Hueneke (age 56), after receiving an oral report of the investigation, made the decision to offer Petitioner the option of returning to North Carolina as a district manager or accepting a severance package. There is not one iota of evidence in the record to suggest that Hueneke's decision was based on anything other than the serious, continuous, documented employee relations problems in Atlanta, as confirmed by the investigators, Ms. McLaughlin and Ms. Marcott.

Based on the continuous nature of the complaints over a three-year period, Respondent had to have known to an absolute certainty that it had a serious employee relations problem in Atlanta. Twelve complaints, some from experienced managers, accompanied by resignations, threatened resignations, and medical problems[10] are overwhelming proof of major employee dissatisfaction. The sheer number, similarity, and seriousness of the complaints would have caused any responsible employer to conclude that there were major problems in Atlanta.

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[10] Ms. D'Arezzo, the twelve-year veteran who Grizzle recommended to be area manager and who Grizzle later asked not to resign, said that the situation with Petitioner was causing her to become ill. 1SR-Wilson Dep. Ex. 20. Priestman was prescribed the anti-depressant, Paxil, because of her situation at work. 1SR-Priestman Dep. at 123, 149.

While Petitioner argues in her Petition that Priestman's testimony is "directly contrary to claims of 'employee abuse,'" just the opposite is true. Pet. at 16. Petitioner claims that Priestman's deposition testimony "confirmed" that Petitioner never "screamed or yelled," never had temper tantrums, and never threatened anyone. *Id.* at 5. To the contrary, Priestman confirmed that she was sometimes very afraid of Petitioner (1SR-Priestman Dep. at 31), her staff was "very afraid" of Petitioner (*Id.*), that Petitioner "managed by intimidation" (*Id.*), that Priestman's staff complained that Petitioner had yelled at them (1SR-Priestman Dep. at 85-86), that Priestman heard Petitioner yell at Budd which made Budd cry (1SR-Priestman Dep. at 87-88), and that the staff, including Priestman and Budd, feared for their lives. (*Id.* at 88). Budd's affidavit similarly states, "[Petitioner] was abusive towards me and other [Respondent] managers and employees in Atlanta on a regular basis" (R1-24-App. Budd Aff. ¶ 4), "I was and am afraid of [Petitioner]. To this date, I still have nightmares about her. She screamed at me and others, slammed doors, and hung up on people" (*Id.* at ¶ 12). Both Budd's affidavit and Priestman's deposition testimony support Respondent's position.

2. That Respondent Offered Petitioner The Opportunity To Return To North Carolina As A District Manager Does Not Contradict Respondent's Legitimate Non-Discriminatory Reason

Respondent's decision to offer Petitioner a district manager position in North Carolina does not contradict Respondent's legitimate non-discriminatory reason. Petitioner's assertion that the district manager position "required more employee contact and supervision then [sic] did Petitioner's position as Atlanta area manager" is misleading. As a district manager, Petitioner would not only have had responsibility for many fewer locations (and correspondingly fewer employees), she would also have

had less authority, and she herself would have been more closely supervised since the North Carolina office already had an area manager, Lynda Bowman, whereas Mr. Krueger had been trying to supervise Petitioner from Milwaukee, a situation that was satisfactory to no one. The demotion would not have given her more opportunity to abuse employees, it would have given her less because she would have had many fewer employees to abuse, less authority with which to be abusive, and a manager on hand to keep the abuse from happening at all.

Respondent's decision to offer Petitioner a position of less authority, under close supervision, and with fewer subordinate employees is entirely consistent with its belief that Petitioner had been the cause of chronic employee relations problems and high turnover in Atlanta. That Respondent chose to offer Petitioner a second chance, rather than to outright discharge her, is simply reflective of the fact that Respondent hoped Petitioner might change her behavior. It is hardly reflective of age discrimination.

3. Grizzle's "Be Aggressive" Memo to Petitioner In 1995 Is Not Evidence That Respondent's Reasons For Removing Her As Area Manager In 1999 Were Pretextual

Petitioner cites to a memo Grizzle sent to her dated September 15, 1995 telling her to be aggressive to suggest that Respondent's reason is pretextual. Pet. at 4. The most obvious flaw with any suggestion that this memo renders Respondent's reason pretextual is Petitioner's own testimony that Grizzle's memo did nothing to influence the manner in which Petitioner treated her subordinates. 1SR-Wilson Dep. at 151. According to her, Petitioner would have treated her subordinates the same even if Grizzle had not sent Petitioner the memo.

The second flaw with Petitioner's suggestion is that Grizzle sent her a later memorandum directing her to stop

"micromanaging" and telling her that unless she changed her methods "there is no recovery." 1SR-Wilson Dep. Ex. 21.

The third flaw is that the 1995 memo certainly did not instruct Petitioner to throw things, yell at people, threaten people, intimidate people, slam doors, or to engage in any of the behaviors that her subordinates complained of.

The final flaw is that whatever the departed Grizzle said in a single memo to Petitioner in 1995 has no bearing on what Mr. Hueneke in 1999 decided should be done in order to address the chronic problems in Atlanta that had gone on far too long.

4. There Was No Statistical Evidence In This Case

As the District Court properly found, the "statistical evidence" offered by Petitioner in this case is meaningless. R3-37-12, 13.

Courts generally exercise caution in relying on statistics in an age discrimination case. *Vaughan v. MetraHealth Cos.*, 145 F.3d 197, 203 (4th Cir. 1998). Statistics are generally of little, if any, probative value in an individual case. *Smith v. Horner*, 839 F.2d 1530, 1537 n.8 (11th Cir. 1988) (statistics alone cannot be used to establish a prima facie case of discrimination in an individual disparate treatment case).

Petitioner cannot escape the deficiencies of her alleged statistical evidence – no analytic foundation and no context. There is no evidence as to how the qualifications of the persons selected to be a regional vice president compare to those not selected; there is no evidence regarding who applied for the promotions; there is no expert testimony. Statistical evidence without this type of context is meaningless and alone is not evidence that an employer's proffered reasons are pretextual. *Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1255 n.2 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1486 (2001).

B. THERE IS NO EVIDENCE THAT RESPONDENT'S OTHER REASON – HIGH EMPLOYEE TURNOVER – IS PRETEXTUAL

In addition to the chronic, documented complaints about Petitioner, Respondent was also concerned about the enormous employee turnover, including management turnover, in the Atlanta market. With just the resignations of Ms. Haas and Ms. D'Arezzo, both managers, the Company lost a total of twenty years of experience. Petitioner now claims that "there is no evidence that turnover rates were any higher" under Petitioner than at any other period. Pet. at 17. That argument provides no basis for which a rational factfinder could conclude that Respondent's concerns about turnover were pretextual.

First, Petitioner admits that she was "expressly instructed by her superiors to address the issue of chronic under-performance in the Atlanta area," including turnover. *Id.* at 3-4. Krueger predicted an annualized turnover rate of 94% (1SR-Wilson Dep. Ex. 50); Petitioner projected an annualized turnover rate of 66.7%.[11] *Id.* Even giving credence to Petitioner's assertion that these excessive levels of turnover were no higher than those achieved under any other area manager, Petitioner nonetheless clearly failed to live up to Respondent's express instructions to reduce the level of turnover. Krueger told Petitioner that he, Fromstein (the President of Respondent), and Hueneke (the Executive Vice President who made the decision to offer Petitioner the choice of returning to North Carolina or accepting a severance package) had higher expectations for the Atlanta market. 1SR-Wilson Dep. at 114-116. Petitioner's failure to achieve the results expected

[11] Even Grizzle, before his firing, thought turnover was "more excessive than what I thought should have been going on." 1SR-Grizzle Dep. at 145.

of her justified Respondent's actions. Age was never a factor.

Second, Petitioner knew herself that the turnover in her area was "too high." 1SR-Grizzle Dep. at 145. She knows of no area that had a higher employee turnover rate than hers did. 1SR-Wilson Dep. at 199. Moreover, Petitioner's own testimony is that Krueger blamed her for the high turnover rate. *Id.* at 129-130. While Petitioner may believe that blaming her for the high turnover is unfair, there is no dispute that Respondent did, in fact, believe that Petitioner was accountable for the high turnover, and it had a sound basis for that belief. Many of the resignation letters expressly state that the reason employees were leaving in droves was because of Petitioner. 1SR-Wilson Dep. Exs. 15, 17, 19, 20, 25.

Third, if low pay was the problem, as Petitioner suggests,[12] one might have expected Petitioner to have said something about low pay being a problem, or to have recommended a salary review, in the communications she exchanged with Krueger. Instead, in one memo, Petitioner blames the fact that everyone is quitting on an employee "conspiracy." 1SR-Wilson Dep. Ex. 27. Moreover, of the non-anonymous people who complained in writing about Petitioner – Pamela Barkley, Diana Haas, Else Henry, Vallerie Brown, Susan D'Arezzo, Mary Heeking, and Kathi Badal – all gave Petitioner, not low pay, as the reason they were resigning.[13]

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[12] "Personnel turnover has always been very high in Atlanta because Respondent under-compensated its employees. . . . " Pet. at 4.

[13] Perhaps Petitioner forgot about the resignations of Mses. Barkley, Haas, Henry, Brown, D'Arezzo, Heekin, and Badal when she claims on page 17 of her Petition that the exit interviews of departing Respondent employees indicated that none of them were leaving because of Petitioner's abuse. Pet. at 17. Perhaps Petitioner sees a meaningful distinction between an exit interview and letters from seven resigning employees saying the reason they are resigning is

(Continued on following page)

Petitioner's assertion that none of the sixteen employees who departed in 1998 indicated that they were leaving because of Petitioner's abuse (Pet. at 17) ignores four obvious points: (1) it ignores the written complaint letters expressly stating that the employees were resigning because of Petitioner; (2) it ignores the fact that four of the resigning employees in 1998 cited "job dissatisfaction" and three cited "stress" as the reason they were quitting; (3) it ignores the employees who in 1998 said they were considering quitting because of Petitioner or, in Harold Schwartz's case, decided not to work at Respondent at all because of Petitioner; and (4) it ignores the obvious fact that, as pointed out by one of the letter-writers, when people "do leave they don't tell the real reason in the exit interview because they are usually with her [Petitioner]." 1SR-Wilson Dep. Ex. 24.

Petitioner can argue that the unusually high turnover was not her fault. Respondent obviously, and for good reason, concluded otherwise. Petitioner has no evidence to show that Respondent did not honestly believe that she was the primary cause of the high turnover and no evidence to suggest that that was not Respondent's reason for wanting her out of the Atlanta market.

III. PETITIONER PROVIDED NOT ONE SHRED OF EVIDENCE TO INDICATE THAT HER AGE HAD ANYTHING TO DO WITH RESPONDENT'S ACTIONS

As the Court reminds us in *Reeves*, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff

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because of Petitioner. Or perhaps she is relying on a distinction between 1998 on the one hand and 1995, 1996, and 1997 on the other hand. Regardless, there exists overwhelming record evidence that Petitioner was the primary cause of Atlanta's unusually high turnover.

was a victim of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

In *Reeves*, the record is replete with indications that the employer's actions were motivated by the employee's age. The employee was told "he was so old he must have come over on the Mayflower" and that he "was too damn old to do his job." *Id.* at 151. Moreover, the employee adduced evidence that he was treated differently from younger employees despite the fact that they had nearly identical rates of productivity. *Id.* at 151-152.

Petitioner, on the other hand, provided no evidence to indicate that her age, and not the chronic, documented reports of abusive behavior and resulting employee turnover, had anything to do with Respondent's actions. Terry Hueneke, the Executive Vice President who made the decision to offer Petitioner the option of returning to North Carolina or accepting a severance package, was 56 years old. Petitioner's replacement, Kathy Taylor, was 55 years old. Grizzle's replacement, Donald G. Johnston, was 53 years old. Kathy Bowman, the area manager who would have supervised Petitioner in North Carolina had she accepted the position offered by Respondent, was 61 years old.

The answer to the ultimate question in this case is that Petitioner was a victim of her own abusive and unprofessional management style and her unwillingness to modify that style and stem the unacceptably high level of employee desertion it caused. Age was not a factor.

CONCLUSION

Respondent offered two legitimate, non-discriminatory reasons for its actions. Petitioner failed to provide evidence from which a rational factfinder could conclude that either of these reasons was pretextual. As a result, the District Court's granted summary judgment and the Eleventh Circuit Court of Appeals affirmed *per curiam*.

Petitioner's failure to adduce even the minimum evidence required to survive a motion for judgment as a matter of law makes this case inappropriate for certiorari.

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